

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT,
17.74.350, 17.74.352, 17.74.355,)	REPEAL, AND ADOPTION
17.74.359, and 17.74.364; the repeal of)	
17.74.401, 17.74.402, 17.74.403, and)	(ASBESTOS)
17.74.404; and the adoption of New)	
Rules I through IV pertaining to)	
incorporation by reference, definitions,)	
asbestos project permits, training)	
provider requirements, fees, and refunds)	

TO: All Concerned Persons

1. On February 28, 2020, the Department of Environmental Quality published MAR Notice No. 17-410, pertaining to the public hearing on the proposed amendment of the above-stated rules at page 354 of the 2020 Montana Administrative Register, Issue No. 4. On March 27, 2020, the department published a supplemental notice at page 525 of the 2020 Montana Administrative Register, Issue Number 6, where the public hearing was rescheduled to April 29, 2020, and the comment period was extended to May 1, 2020. On April 17, 2020, the department published an amended supplemental notice at page 633 of the 2020 Montana Administrative Register, Issue Number 7, where the in-person public hearing was changed to a teleconference.

2. The department has amended ARM 17.74.350, 17.74.355, 17.74.359, and 17.74.364; repealed ARM 17.74.401, 17.74.402, 17.74.403, and 17.74.404; and adopted New Rule I (ARM 17.74.406), New Rule II (ARM 17.74.407), New Rule III (ARM 17.74.408), and New Rule IV (ARM 17.74.409) as proposed.

3. The department has amended ARM 17.74.352 as proposed but with the following changes from the original proposal, stricken matter interlined and new matter underlined:

17.74.352 DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) though (13) remain as proposed.

(14) "Asbestos unit measurement (AUM)" means each unit of asbestos-containing material that may be disturbed or removed either in square, linear, or cubic feet or any combination thereof. The unit of measure (square, linear, or cubic feet) will be selected, for AUM calculation purposes, based on the configuration of the material, pre-abatement, as described in the asbestos inspection report, or executed contract document.

(15) through (38) remain as proposed.

4. The department considered all substantive comments received. A

summary of the comments received, and the department's responses are as follows:

COMMENT NO. 1: Considering recent events unfolding rapidly, the commenter requested the process for the proposed rule changes be postponed for at least 30 days or until the national and state states of emergency are withdrawn.

RESPONSE: The department agrees with the comment. The department rescheduled the original hearing date of March 24, 2020, to April 29, 2020, and extended the public comment period until May 1, 2020. In addition, the hearing was held by teleconference rather than in-person in response to the public health emergency created by COVID-19.

COMMENT NO. 2: There are descriptions in the asbestos fee rules for square feet, linear feet, and cubic feet. How do you decide which unit of measure to use when calculating the AUM total? This should be somehow tied to the bid document scope or inspection report description.

RESPONSE: The department agrees with the comment. The department has modified the proposed amendment to the definition of AUM set forth in ARM 17.74.352(14). The modification clarifies that AUMs are calculated based on the arrangement of the material before its disturbance or removal, as described in the inspection report or executed contract document.

COMMENT NO. 3: Why are the fee increases justified? Saying that it's been years since the department raised fees is not sufficient justification.

RESPONSE: As explained in MAR Notice No. 17-410 and in the department's Small Business Impact Analysis, it is necessary for the department to increase revenue to support administration of the Asbestos Control Act and the Federal Asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP). The department is sensitive to the impact the proposed fee increases will have on the regulated community. The proposed fee structure will simplify assessment of permit fees, be more equitable and predictable, and be commensurate with costs incurred by the department as required by 75-2-503(1)(k), MCA.

DEQ hosted asbestos fee rulemaking stakeholder meetings prior to initiating this rulemaking. Based on feedback from stakeholders, the department adjusted the proposed AUM fee structure in Table 2 to decrease the cost per AUM for asbestos projects that remove or disturb larger quantities of asbestos containing materials to avoid charging large projects significantly more than smaller projects. See Comment No. 4. The department also proposed to set a cap for project fees at \$16,000 to avoid overcharging for large asbestos projects.

Federal grant money has decreased over the years. For the department to be a self-sufficient program, it is necessary to increase fees. The proposed fee increases will support the department's goals of increasing compliance assistance, enhancing educational and training programs, and filling a current fulltime position in the program that has been vacant for over two years. In addition, the proposed amendment adopts new fee categories supporting administrative services the department has provided to the regulated community without remuneration, such as

processing demolition notices, revising project permits, processing emergency permits, and reviewing requests for alternative work practices.

COMMENT NO. 4: The proposed AUM fee schedule will work in most instances. However, there are a few areas where the new AUM fee schedule will unreasonably raise permit fees. The commenter provides two examples:

Example 1: A floor tile project of 27,500 sq. ft. of mastic. The permit under the current permit fee system is \$890.22; under the new system, that permit fee would be \$6,000. That is a fee increase of over 670 percent and would result in a permit fee over 25 percent of the contract value.

Example 2: A ceiling tile project of 13,900 sq. ft. of tile. The permit fee under the current rule is \$712.92; under the new proposed rule the permit fee would be \$4,000. That is an increase of over 560 percent.

RESPONSE: Under the existing permit fee rules, asbestos project permit fees are calculated based on either itemized contract charges directly associated with conducting the asbestos project or on the contract volume, which is defined as the total of all charges associated with the contract. The department acknowledges that larger asbestos projects involving the disturbance or removal of a substantial amount of asbestos-containing material, will be subject to increased fees under the proposed new fee rules. However, the department believes the proposed fee structure will simplify the assessment of permit fees, will result in more equitable and predictable assessment of fees, and will be commensurate with costs incurred by the department as required by 75-2-503(1)(k), MCA. See response No. 3.

The proposed fee amendments mitigate increased asbestos project fees by treating layered homogenous materials as one layer of asbestos-containing material for fee assessment purposes and capping the total fee at \$16,000 per asbestos project permit.

In addition, permit costs cannot be directly compared between the current fee structure and the proposed fee structure because the current fee structure relies on project contract costs negotiated between the asbestos professional and project owners or operators rather than the actual amount of asbestos-containing materials removed or disturbed. The department believes the proposed fee structure will result in more foreseeable fees associated with asbestos projects and a system of fees that are easier for the department to implement.

The proposed AUM fees, from Table 2 in MAR Notice No. 17-410, decrease in cost per AUM as the project AUM quantity increases. For example, the AUM fee for the removal of 101 AUMs is \$150.00, or \$1.49 per AUM. Removal of 300 AUMs is \$150.00, or \$ 0.50 per AUM. See the table below:

AUM Fees from Table 2 in MAR Notice 17-410, broken down by cost per AUM:

AUM Quantity	Table 2 Cost for AUM Quantity	Lowest Cost per AUM	Highest Cost per AUM
up to 100	\$100	\$1.00	\$100

101-300	\$150	\$0.50	\$1.49
301-500	\$200	\$0.40	\$0.66
501-750	\$300	\$0.40	\$0.60
751-1,500	\$600	\$0.40	\$0.80
1,501-3,000	\$1,000	\$0.33	\$0.67
3,001-5,000	\$2,000	\$0.40	\$0.67
5,001-10,000	\$3,000	\$0.30	\$0.60
10,001-25,000	\$4,000	\$0.16	\$0.40
25,001-50,000	\$6,000	\$0.12	\$0.24
50,001-100,000	\$8,000	\$0.08	\$0.16
100,000+	\$16,000	Less than \$0.16	\$0.16

COMMENT NO. 5: Regarding AUMs, while in line with most of the units, is still rather lopsided when it comes to our mastics. The commenter appreciates being allowed to consolidate tile and mastics together under the proposed rule amendments, but believes it still represents a large increase. The commenter gave an example of a project they just completed. For this project, they paid a permit fee of approximately \$1,000. Under the proposed fee scale, the permit fee would be almost \$5,000 – a 500 percent increase -- when it comes to floor tile and mastics.

RESPONSE: The current fee structure was adopted in 2008. Since that time, regulated permitted projects are increasing yet department revenue for the asbestos program is decreasing. The department believes the proposed fee structure will result in more equitable and predictable assessment of fees, and will be commensurate with costs incurred by the department as required by 75-2-503(1)(k), MCA. See responses No. 3 and 4.

COMMENT NO. 6: Removing state reciprocity during future technical rule changes has been discussed. Will adopting a fee for accreditation based on out-of-state reciprocity interfere with removing out-of-state reciprocity later?

RESPONSE: The inclusion of a fee for accreditation based on out-of-state reciprocity does not preclude the department from considering out-of-state reciprocity in future rulemaking, such as in the future technical rule changes. The proposed new fee rules eliminate the discount for multiple accreditations when the accreditations are based on out-of-state reciprocity. This is intended to reflect increased costs to the department to evaluate compliance with the Montana Asbestos Control Act and administrative rules adopted under that Act by persons that have been accredited in other states with different, and potentially less stringent, requirements until out-of-state reciprocity is addressed in future rules.

COMMENT NO. 7: Concerning reciprocity, the department is discriminating against in-state contractors by not eliminating reciprocity and allowing out-of-state contractors to train in Montana with no fees. The commenter asks how does the proposed rule change address this.

RESPONSE: The department plans to give out-of-state reciprocity due

consideration in future rulemaking. See response No. 6.

COMMENT NO. 8: How will the department enforce the proposed changes?

RESPONSE: The department's asbestos control program (ACP) performs routine desk audits of permitted projects to ensure compliance. Additionally, the department relies on its Enforcement Division to ensure compliance with the Montana Asbestos Control Act, asbestos rules, and permit requirements.

The ACP inspects asbestos projects and will investigate suspected noncompliance by asbestos permit holders related to performance of asbestos projects, storage of asbestos-containing material, or maintenance of records related to asbestos projects pursuant to 75-2-518, MCA. When the department believes a violation of the Montana Asbestos Control Act, rules adopted under that Act, or the terms and conditions of a permit issued under that Act have occurred, it may initiate informal enforcement activities, including warning and violation letters or formal enforcement actions. Formal enforcement activities include administrative orders and judicial orders, and may require corrective action including assessment of administrative or civil penalties.

COMMENT NO. 9: Will the proposed rules be uniformly enforced against compliant and non-compliant; or will the department continue to discriminate only against the compliant community?

RESPONSE: The department will uniformly enforce requirements applicable to any asbestos project regulated under the Montana Asbestos Control Act and administrative rules adopted under that Act. Both compliant persons, who are operating an asbestos project under a department-issued asbestos project permit, and non-compliant persons, who are operating an asbestos project without a required department-issued asbestos project permit, must comply with the Montana Asbestos Control Act and administrative rules adopted under that Act including asbestos project permit requirements.

The department will continue to provide education, outreach, and compliance assistance to ensure non-compliant persons come into compliance. In addition, the department has a Small Business Environmental Assistance Program (SBEAP). SBEAP is a separate non-regulatory program within DEQ that assists Montana businesses in understanding and complying with environmental regulations. SBEAP offers permitting assistance and provides workshops and trainings. See response No. 8.

COMMENT NO. 10: Has the department considered tying compliance to enforcement? For example, if the department "claims" a 25 percent compliance rate, 25 percent of the Asbestos Control Program (ACP) Compliance Funding and 25 percent of the Enforcement Division funding shall be used on projects that are compliant but may be deficient. The remaining 75 percent of ACP and Enforcement resources must be applied to projects that are non-compliant and have concerns of deficiency. The commenter stated that this will ensure an increase in revenue by adding non-compliant members to the fee structure.

RESPONSE: The department is committed to increasing compliance with the Montana Asbestos Control Act and administrative rules adopted under that Act. The

department strives to bring non-compliant persons within the fee structure to increase revenue, but there remains a need to raise fees to fund the Asbestos Control Program. The department is working to increase awareness of asbestos-related issues both internally, across department programs, and externally, with the regulated community and other state and local government agencies. For example, because of an Asbestos Advisory Group recommendation, the department is working with the Montana Department of Labor and Industry (DLI) - Building Codes Program. The two agencies will provide asbestos information to contractors registering with DLI for large state contract building permits. The department will be notified about these projects and provide compliance assistance before construction work begins. The department continues to improve compliance assistance communication with contractors through its relationship with DLI and other governmental agencies.

However, funding the asbestos control program through increased enforcement is more complicated because administrative and civil penalties collected for violations of the Montana Asbestos Control Act are deposited to the state general fund and not to a special fund where they are available to fund the asbestos control program. This may only be changed through statutory amendment.

COMMENT NO. 11: When the ACP does its fiscal estimates for their budget and decides what priorities need to be addressed by the ACP, increasing compliance within the state of Montana is never budgetarily addressed. If more compliance was achieved, more permit fees would be paid, and that would increase revenue for the department without as large an increase in fees.

RESPONSE: ACP's budget and priorities are structured based on mandates set forth in the Montana Asbestos Control Act and administrative rules adopted under that Act. Increasing compliance would increase revenue, but would not fully fund the program. The department has determined it is necessary to amend the fee rules to establish sufficient funding to support accreditation of persons working in an asbestos occupation, to support training course approval, and to enable the department to effectively operate and implement its other federal and state regulatory obligations. This fee proposal is intended to simplify the existing fee structure, to apply the fees equitably across the regulated community, to provide predictability, to be commensurate with costs as required in 75-2-503(1)(k), MCA, and to generate sufficient revenue to meet department mandates. See response No. 10.

COMMENT NO. 12: Fee increases should be allocated to achieve a rise in compliance. The ACP budget should allocate funding toward the asbestos compliant industry and non-compliant asbestos industry associating the ACP compliance rate with funding of ACP efforts.

RESPONSE: See response Nos. 10 and 11.

COMMENT NO. 13: When the math is done for calculating what the department needs to fund the ACP, there is no provision for increasing compliance and what increasing compliance would do for permit fees. If the department increases compliance, there would be more permit fees and thereby more revenue

for the department's ACP. The department always put the burden on the regulated community that is already trying to do things right instead of trying to bring more regulation and compliance into our asbestos regulation community.

REASON: See response Nos. 10 and 11.

COMMENT NO. 14: Does an already approved trainer have to pay the approval fee or only the renewal fee?

RESPONSE: Upon timely renewal application, an accredited trainer would just pay the renewal fee per course every two years.

COMMENT NO. 15: If a person has approval to conduct both a Contractor Supervisor Initial (CSI) class and a Contractor Supervisor Refresher (CSR) course, are two renewals for a total of \$600 due every two years?

RESPONSE: Upon timely application for renewal of the two courses, two renewal fees are due every two years to maintain approval to continue to conduct both courses, but the total renewal fees due every two years would equal \$500 based on \$300 for CSI renewal plus \$200 for CSR renewal.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ Edward Hayes

EDWARD HAYES
Rule Reviewer

BY: /s/ Shaun McGrath

Shaun McGrath
Director

Certified to the Secretary of State, June 16, 2020.